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Evidence Act has been quoted *in extenso* in the judgment of the learned Chief Justice in the present case, and does not need repetition. Their Lordships desire to record their full concurrence with the principle there laid down.

They do not consider it necessary to refer to all the authorities that have been cited on both sides, as they think that the views expressed by Lord Kingsdown and Lord Shand completely answer the contentions of the appellant.

Upon a review of the facts as well as of the authorities, their Lordships have come to the conclusion that the judgment of the High Court is right and that this appeal should be dismissed with costs, and their Lordships will humbly recommend His Majesty accordingly.

Solicitors for appellant: *Barrow, Rogers, and Nevill.*

Solicitors for respondents: *Sandersons and Orr-Dignams.*

REVISIONAL CIVIL.

Before Mullick and Ross, J.J.

RAGHUNANDAN PANDEY

v.

GARJU MANDAL.*

Bengal Tenancy Act, 1885 (Act VIII of 1885), section 174—Order refusing to set aside a sale, whether appealable—auction-purchaser a stranger—decretal amount paid out of Court—deposit of damages only—section 174, whether sufficient compliance with. In execution of a decree for rent passed under the Bengal Tenancy Act, 1885, the tenant's holding was sold and was purchased by a third party. Within

* Civil Revision no. 42 of 1925 and Miscellaneous Appeal no. 34 of 1925, from an order of C. H. Reid, Esq., I.C.S., District Judge of Bhagalpur, dated the 12th January, 1925, reversing an order of B. Braj Bilas Prasad, Munsif, Second Court, Bhagalpur, dated the 21st August, 1924.

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thirty days of sale the deposit of 5 *per cent.* of the purchase money for payment as compensation to the auction-purchaser was made in Court by the judgment-debtor and the deposit was accompanied by a petition to set aside the sale and stating that the amount recoverable under the decree had been paid to the decree-holder; the decree-holder himself joined in the petition. The Munsif was of opinion that there had been no compliance with the provisions of section 174, Bengal Tenancy Act, and refused to set aside the sale, but on appeal the District Judge held that there had been a substantial compliance with the terms of the section and set aside the sale.

Held, in revision, that there had not been a compliance with the provisions of section 174 of the Bengal Tenancy Act, 1885. *Kabilaso Koer v. Raghu Nath Sakan Singh* (1), followed.

Held, also, that in a case where the auction-purchaser is not a party to the suit no appeal lies against an order under section 174 of the Bengal Tenancy Act, but if he is a party to the suit and is a decree-holder, an appeal lies under section 47, Civil Procedure Code, it being a matter arising between the parties to the suit touching the execution, satisfaction and discharge of the decree.

Raziuddin Hossain v. Bindeshwari Prasad Singh (2) and *Akhouri Prem Narain v. Mussamat Fahinunnissa* (3), followed.

This was an application in revision against an order by the District Judge of Bhagalpur reversing an order of the Munsif of Bhagalpur passed under section 174 of the Bengal Tenancy Act. There was also an appeal for admission.

It appeared that in execution of a decree for rent the tenant's holding was sold and was purchased by a third party. Within thirty days of the sale the deposit of 5 *per cent.* of the purchase money for payment as compensation to the auction-purchaser was made in court and the deposit was accompanied by a petition stating that the amount recoverable under the decree had been paid to the decree-holder and the

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(1) (1890) I. L. R. 18 Cal. 481.

(2) (1916) 36 Ind. Cas. 769.

(3) (1917) 2 Pat. L. J. 525.

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decree-holder himself joined in this petition. The judgment-debtor therefore prayed under section 174 of the Bengal Tenancy Act that the sale should be set aside. The Munsif was of opinion that there had been no compliance with the provisions of the section and he declined to set aside the sale. On appeal the District Judge thought there had been substantial compliance with the terms of section 174 inasmuch as after the admission of the decree-holder that he had received the money, nothing more was recoverable under the decree, and only the compensation payable to the auction-purchaser remained to be deposited. He therefore set aside the sale.

Sambhu Saran, for the appellant :—In this case the auction-purchaser was a stranger, hence the order made under section 174 of the Bengal Tenancy Act was not appealable. An appeal lies only where the auction-purchaser happens to be the decree-holder himself, inasmuch as the case would then be covered by section 47, Civil Procedure Code.

The order of the appellate Court was made without jurisdiction and that of the Court of the first instance must, therefore, stand. I rely on *Akhourri Prem Narain v. Mussamat Fahinunnissa*⁽¹⁾ and *Raziuddin Hossain v. Bindeshwari Prasad Singh*⁽²⁾.

Nirode Chandra Roy, for the respondent : In the present case there has been a sufficient compliance with the provisions of section 174, Bengal Tenancy Act, which lays down that within thirty days of the sale the decretal amount and 5 *per cent.* of the purchase-money as compensation for the auction-purchase should be deposited in Court. Where, however, the decree-holder has in fact been paid out of court and he also certifies to that effect, the necessity of the decretal sum being deposited in Court should be dispensed with. Depositing the decretal amount in Court again would mean paying the decree-holder twice over. The order of the Munsif is, therefore, clearly

(1) (1917) 2 Pat. L. J. 525.

(2) (1916) 86 Ind. Cas. 769.

wrong and has rightly been set aside. The order of the District Judge is not open to revision as it is substantially a just one. This Court interferes under its revisional powers simply to meet the ends of justice and where there has been no failure of justice it should not interfere with the order passed on appeal by reason only of the fact that no appeal lay to the Court below. See *Kishori Mohan Ray v. Sarodamani Dasi*⁽¹⁾.

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Sambhu Saran, in reply: The order of the District Judge is wrong on the merits. The point in issue is concluded by the case of *Kabilaso Koer v. Raghu Nath Singh*⁽²⁾, where, under similar circumstances, it was held that there was no compliance with the provisions of section 174, Bengal Tenancy Act. In order that the judgment-debtor should take the benefit of section 174 he must strictly comply with its terms; and inasmuch as that section lays down that the decretal amount has to be deposited in Court, the provision is imperative and must be complied with before the sale can be set aside.

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Ross, J. (after stating the facts set out above, proceeded as follows): It is contended on behalf of the auction-purchaser that no appeal lay to the District Judge. It is to be noticed that in this case the decree-holder and the judgment-debtor were at one and there was no question to be decided between them. The question for decision was a question between the judgment-debtor and the auction-purchaser and therefore the case did not fall within the provisions of section 47 of the Code of Civil Procedure. It was held in *Raziuddin Hossain v. Bindeshwari Prasad Singh*⁽³⁾, that in such a case no appeal lies. In *Akhouri Prem Narain v. Mussammat Fahinunnissa*⁽⁴⁾, the question for decision was a question between decree-holder and judgment-debtor and on this ground it was held that an appeal did lie. With reference to

(1) (1896-97) 1 Cal. W. N. 30.

(2) (1901) I. L. R. 18 Cal. 481.

(3) (1916) 86 Ind. Cas. 769.

(4) (1917) 2 Pat. L. J. 525.

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the case just cited, it was observed that "all the authorities recognize and decide that in a case where an auction-purchaser is not a party to the suit, then no appeal lies against an order under section 174, but if he is a party to the suit and is a decree-holder in fact then section 47 comes into play and an appeal lies, it being a matter arising between the parties to the suit touching the execution, satisfaction or discharge of the decree." The same view was taken in Miscellaneous Appeal no. 215 of 1924 where it was held that on a question under section 174 between the judgment-debtor and the auction-purchaser no appeal lay.

The order of the learned District Judge must therefore be treated as having been made without jurisdiction. It is therefore subject to revision under section 115 of the Civil Procedure Code. The learned Vakil for the opposite party, however, contends that even if the order was without jurisdiction, this Court should not interfere with it in revision if it is substantially a just order. It is therefore necessary to consider whether the decision of the learned Munsif or that of the learned Judge was the correct decision. This question is concluded by the decision of the Calcutta High Court in *Kabilaso Koer v. Raghu Nath Sakan Singh*⁽¹⁾ where on facts precisely similar to those of the present case it was held that section 174 had not been sufficiently complied with.

The application in revision must therefore be allowed and the order of the learned District Judge must be set aside and the order of the Munsif restored and the sale confirmed.

The petitioner is entitled to the costs of this application.

The appeal is dismissed.

MULLICK, J.—I agree.

Application granted.

Appeal dismissed.